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COMMISSION ON HUMAN RIGHTS

Inter-sessional open-ended Working Group on a
draft optional protocol to the Convention
on the Rights of the Child on involvement
of children in armed conflicts
Second session
Geneva, 15-26 January 1996

COMMENTS ON THE REPORT OF THE WORKING GROUP

Report of the Secretary-General

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Introduction

1. In paragraph 15 of its resolution 1995/79 of 8 March 1995, entitled "Rights of the child", the Commission on Human Rights requested the Secretary-General to transmit the report of the working group for the elaboration of a draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (E/CN.4/1995/96) to Governments, relevant specialized agencies and intergovernmental and non-governmental organizations, the Committee on the Rights of the Child, the International Committee of the Red Cross, and the expert appointed to undertake the study on the impact of armed conflicts on children, and to invite their comments thereon in time for circulation prior to the next session of the working group.

2. Pursuant to that resolution, the Secretary-General, on 20 September 1995, addressed requests to Governments, specialized agencies and intergovernmental and non-governmental organizations concerned, the Committee on the Rights of the Child, the International Committee of the Red Cross, and the expert appointed to undertake the study on the impact of armed conflicts on children for comments on the report of the working group on its first session.

3. By 22 November 1995, replies had been received from the Governments of Croatia, the Philippines and Sweden.

4. Replies were also received from the United Nations Children's Fund, the United Nations Population Fund, the International Labour Organization and the Organization of African Unity.

5. A reply was also received from Ms. G. Machel, the expert appointed to undertake the study on the impact of armed conflicts on children.

6. Comments were submitted by the Friends World Committee for Consultation (Quakers).

7. The present report contains a summary of the substantive replies received. It also includes information submitted by the Governments of Burkina Faso and the Syrian Arab Republic pursuant to Commission on Human Rights resolution 1994/91, received after the preparation of documents E/CN.4/1994/WG.13/2 and Add.1 to 3.

8. Any additional replies will be reproduced in an addendum to the present document.

I. COMMENTS RECEIVED FROM STATES

Burkina Faso

[Original: French]
[5 October 1994]

The preliminary draft protocol meets the concerns of Burkina Faso regarding the protection of children under 18 years old against the atrocities of war. The minimum age for recruitment into the Burkina Faso army has been set at 20 years. The former People's National Service, now National Development Service, lays stress on production, playing down the practical phase of military training. Though its military side has been eliminated, recruitment into the Service takes place at the age of 18.

[Original: French]
[7 November 1995]

The amendments to the articles concerning the child's age are based on the fact that Burkina Faso has signed the African Charter on the Rights and Welfare of the Child, article 2 of which states: "For the purposes of this Charter, a child means every human being below the age of 18 years."

The comments of Burkina Faso concern:

The title of the draft protocol;

The preamble;

Articles 1, 2 and 4, the new article on page 33, the new articles on page 34, and article 8.

Thus:

Title of protocol, page 31: delete "optional".

Preamble, page 32:

Third paragraph: delete "[strengthen]" and "[to increase]";

Fourth paragraph: delete;

Fifth paragraph: delete "optional", "[and their direct participation in hostilities]" and "while giving States Parties which find themselves in a position to do so the possibility to adhere to such a protocol";

Sixth paragraph: delete;

Seventh paragraph: replace "hostilities" by "armed conflicts".

Article 1, page 31:

Delete "[17]", "[a direct]" and "in hostilities";

The other two proposals concerning article 1, on page 32, should be deleted.

Article 2, page 32:

Paragraph 1 accepted;

Delete paragraphs 2 and 3 and the other three proposals.

New article, page 33:

Delete paragraphs 1, 2, 3 and 4;

Delete the first and third alternative proposals;

Maintain the two paragraphs of the second proposal, deleting "[children]", "[should]" and "[other than a State]".

New articles, page 34:

Maintain the first new article, deleting the square brackets;

Delete the second new article.

Article 4, page 34:

Delete the first two proposals and maintain the last proposal, deleting the square brackets.

New article after article 5, page 34:

Maintain this new article, removing the square brackets from around the words "ou leur utilisation dans les hostilités" in the French text.

Article 8:

Paragraph 1: Delete "[twenty-fifth]".

Croatia

[Original: English]
[25 January 1995]

1. In the Republic of Croatia the military obligation starts in the calendar year in which a person completes 17 years of age and includes medical and other checks as well as psychological tests intended to determine the ability for military service, recruitment for military service or civilian service (art. 75, para. 1, of the Defence Act, NN 74/93). Recruitment is done in the

calendar year in which recruits complete 18 years of age, but a person can be drafted in the calendar year in which he completes 17 years of age, provided that he submit a written request to this effect. Those recruits are taken for military service who are found by the recruitment commission to be fit for military service and in the calendar year in which they reach 19 years of age.

2. Article 98, paragraph 1, of the Defence Act allows the President of the Republic, in the event of imminent danger to the independence and integrity of the Republic or in a state of war, to order the recruitment of persons who have reached 16 years of age or to take for military service those who have reached the age of 17. The President of the Republic has not used this power, but the Ministry of Defence has proposed that provisions to this effect be incorporated in the Optional Protocol.

3. In a state of war or in the event of imminent danger to the independence and integrity of the Republic or under extraordinary circumstances the Defence Act provides for the recruitment of volunteers, i.e. those who are not under military obligation and who have joined the armed forces at their own request. In the initial stage of the defence war in Croatia a certain number of persons, not younger than 17 years, who had not been drafted nor enlisted for military service, joined the Croatian armed forces of their own free will. According to information available to military authorities, such persons were dismissed from the armed forces and sent for completion of military service in compliance with the Croatian regulations.

4. Article 1 of the Optional Protocol raises the age limit for participation of children in war conflicts from 15 (art. 38, para. 2, of the Convention on the Rights of the Child) to 18 years and thereby eliminates the incongruence with articles 3 and 6 of the Convention where all human beings under 18 years of age are defined as children and where the principle of protection of the best interests of the child is proclaimed. The difference in relation to article 38, paragraph 2, of the Convention also consists in the omission of the word "direct", so that article 1 of the Optional Protocol should specify whether only a direct involvement in an armed conflict is meant or any involvement in an armed conflict of persons under 18 years of age. For example, article 6 of the Defence Act prescribes the working obligation in the event of armed conflict of all citizens who have reached 15 years of age and who have not been enlisted in the armed forces, so that the Optional Protocol should contain such a provision.

5. It is noted that article 2, paragraph 1, of the Optional Protocol as proposed by Australia (restraint from enlisting persons under 18 years of age) is unacceptable to Croatia due to the powers vested in the President of the Republic in compliance with article 98 of the Defence Act.

6. Article 2, paragraph 2, of the Optional Protocol provides for service in the armed forces before the age of 18, if agreed by the parents or official guardians of the child. This provision does not define the upper age limit, so that we find more appropriate the proposal put forward by Australia according to which children who have not reached the age of 16 cannot be recruited, not even on a voluntary basis.

7. The Optional Protocol should also regulate the voluntary involvement of persons younger than 18 years in an armed conflict (not only within armed forces) and in this case, too, set the age limit of 16 years plus the obligation to complete a certain degree of military training.

8. Article 3 of the Optional Protocol provides for the enlarged responsibility of "armed groups" for drafting and engagement in hostilities of children below 18. The responsibility of "armed groups" was introduced into international law back in 1949 by the Geneva Convention (arts. 4 and 13). The extension of such an approach from the area of humanitarian law to that of the protection of human rights would be in line with the trend of extending responsibility to the area of human rights by introducing individual responsibility and, as is the case here, the responsibility of armed groups.

9. As for the Polish proposal that the Commission on Human Rights, in cases where the recruitment of children in the territory of a State party to the Protocol appears likely, should request the State party concerned for an explanation or should have the right to undertake a confidential investigation including a visit to the State party concerned by two or three members of the Commission, we believe that such a mechanism would be useful as a means of supervising and ensuring the implementation of the Protocol.

Summary

(i) It is proposed to replenish article 1 of the draft optional protocol by adding the word "direct" to the text "do not take part in armed conflict"; the text would thus read: "do not take direct part in armed conflict", in order to specify what kind of involvement in armed conflict is prohibited (direct participation).

(ii) For article 2 it is proposed to define the lower age limit for voluntary enlisting in the armed forces, with the limit to be 16 years of age, as specified in the second sentence of article 2, paragraph 2, in the Australian proposal of 7 November 1994.

(iii) For article 2 it is proposed to add a new paragraph 3 providing for the voluntary involvement of persons younger than 18 in hostilities, subject to the definition of the lower age limit and a certain degree of military training.

(iv) The disputed article 3 providing for the responsibility of "armed groups" is supported.

(v) The Polish proposal on powers to be vested in the Commission on Human Rights in the event of likely violation of the Protocol is supported.

(vi) The Australian proposal of 7 November 1994, except for the part referred to under (ii) above, is unacceptable to the Republic of Croatia.

Philippines

[Original: English]
[8 November 1995]

The Government of the Philippines submitted the following comments and proposals with regard to the draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (E/CN.4/1995/96)

Preamble

1. Third paragraph to read as follows:

Considering that to further strengthen the implementation of the rights recognized in the Convention on the Rights of the Child, there is a need to increase the protection of children from involvement in armed conflicts and from any forms of threat, assault, torture or other cruel, inhuman or degrading treatment.

Note: The action of increasing the protection of children is to further strengthen the implementation of the rights of the child.

2. Suggested as fourth paragraph:

Convinced that an optional protocol to the Convention, raising the age of possible recruitment of persons into armed forces and their direct participation in hostilities to 18 years, will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.

Note: The reason for this optional protocol should be in the preamble but delete the last phrase, "while giving State parties ..." since those who will accede/ratify to the optional protocol are the States parties which are in a position to adhere to the optional protocol. This paragraph introduces the fifth paragraph Recognizing.

The two other suggested paragraphs that is the age of the child, (this is included in the suggested fourth paragraph) and that the military invasions, etc. (this may not apply to all countries) are suggested to be deleted.

Article 1 - suggested to be Article 2

States parties shall take all feasible measures to ensure that persons who have not attained the age of 18 years do not take direct part in hostilities in armed conflict.

Note: This is consistent with the spirit of this optional protocol - to raise the age to 18 years and that they (those below 18 years) should not take direct part in hostilities in armed conflict.

Article 2 - suggested to be Article 1

1. States parties shall take all feasible measures to ensure that persons who have not attained the age of 18 years are not recruited into armed forces.

2. States parties shall only be able to recruit persons under 18 years of age for educational, training purposes and for regular programmes of enrolment in armed forces.

Note: For consistency.

New article

1. All parties in armed conflicts should respect the provisions contained in articles 1 and 2 of the present protocol regarding the involving of children therein in accordance with applicable international humanitarian law.

Note: This will include all parties, not only the State but other armed groups.

2. States parties shall apply legal sanctions to persons committing or ordering to be committed a breach of paragraph 1 of this article.

Note: Legal sanctions are necessary to ensure implementation/adherence of the new article.

Paragraphs 2 and 3 under this proposed new article should be under a new article separate from paragraph 1 and the new paragraph 2 above.

Article 3 - to be adopted.

New article - to adopt paragraphs 1 and 2

1. States parties shall take all necessary measures for the physical and psychological rehabilitation and social reintegration of any child who is a victim of armed conflict, especially measures designed to guarantee, inter alia, medical care and adequate nutrition.

2. For the purposes contained in this article, international cooperation should be strengthened.

New article - to be adopted.

Conditions of peace and security based on unconditional respect of the purposes and principles contained in the Charter of the United Nations are an indispensable prerequisite for the protection of the child.

Article 4

No reservation is admissible to the present protocol.

Article 5 - to adopt the paragraph.

New article - to adopt all paragraphs (1-5).

Article 6 - to adopt paragraphs 1-3.

Article 7 - adopt paragraphs 1 (after the deposit of the tenth instrument of ratification/accession) and 2.

Article 9 - to adopt paragraphs 1 and 2.

Article 10 - to adopt paragraphs 1 and 2.

Sweden

[Original: English]
[30 October 1995]

1. Sweden welcomes the elaboration of an optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts. The fact that children are still being exploited is an affront to the rights of the child.

2. All States have a duty to ensure the strict implementation of the Convention, which states that every human being below the age of 18 should be considered a child, the only exception being article 38. Sweden finds it unacceptable that persons who in every other sense are regarded as children under the Convention are recruited into armed forces and permitted to participate in armed conflicts. Sweden considers therefore that no person under the age of 18 should be recruited into armed forces or take part in hostilities. This age restriction must apply to all parties in armed conflicts.

3. The Swedish Government would also suggest that the Committee on the Rights of the Child be mandated to supervise the observance of the optional protocol.

Syrian Arab Republic

[Original: Arabic]
[11 November 1994]

Article 6 of Legislative Decree No. 115 of 1953, promulgating the Military Service Act, stipulates that: "Every Syrian has a duty to perform compulsory military service on reaching the age at which it becomes obligatory. The said age begins on the first day of the month of January in the year in which the Syrian reaches the age of 19 years and ends when he has completed the period of compulsory service, has been exempted therefrom or has reached the age of 40 years. In the event of war or emergencies, the age at which such service becomes obligatory begins on the first day of the month of January in the year in which the Syrian reaches the age of 18 years". This

means that a Syrian Arab citizen cannot be enlisted in the armed forces if he is under the age of 18 years. However, temporary contracts may be concluded with Syrian civilian graduates of training centres who have reached the age of 16 years so that they can perform service work at the Ministry of Defence at which they are granted permanent appointments on reaching the age of 18 years.

II. COMMENTS SUBMITTED BY UNITED NATIONS BODIES AND SPECIALIZED AGENCIES AND INTERGOVERNMENTAL ORGANIZATIONS

United Nations Children's Fund

[Original: English]
[20 November 1995]

1. UNICEF continues to be particularly concerned with children in armed conflicts. The special issue of the State of the World's Children report of 1996, prepared on the occasion of the UNICEF fiftieth anniversary will propose, as a priority, an agenda against war, in order to prevent the involvement and the suffering of children caught in armed conflicts.

2. In November 1994, at the first session of the Working Group on a draft optional protocol on involvement of children in armed conflicts, the UNICEF representative made reference to the clear position assumed by UNICEF during the drafting process of the Convention on the Rights of the Child. That position, which was shared by many country delegations and NGOs, called for the minimum age for recruitment to be set at 18 years of age.

3. UNICEF considers that the text of the draft optional protocol has benefited from the discussion held during the first session of the Working Group. We welcome the involvement of a significant number of States, intergovernmental and non-governmental organizations, which reflect both the urgent need to combat the involvement of children in armed conflicts and the commitment of the international community.

4. Today UNICEF reiterates its conviction that the recruitment of children below the age of 18 into armed forces, to participate in armed conflicts, should be firmly prohibited by the optional protocol. We consider that the principle of the best interests of the child, as enshrined in the Convention on the Rights of the Child, should prevail in all circumstances. Negative effects inflicted upon children participating in armed conflicts have been demonstrated. Not only their physical and mental health, but also their spiritual, moral and social development are threatened by participation in armed conflicts violating, in this way, several fundamental provisions of the Convention.

5. For the same reason, UNICEF also recommends that voluntary enlistment not be allowed, even with the authorization of the parents or legal guardians. The distinction between voluntary and compulsory recruitment would be very difficult to enforce in practice. The optional protocol should prohibit any form of recruitment of children below the age of 18, either compulsory or voluntary.

6. Through its field experience in war-torn countries, UNICEF has learned that it is very difficult to draw the line between direct and indirect participation of children in hostilities. Involving children in war in any way suggests that they will remain illiterate, deprived of basic education, facing difficulties in adapting to family and community life and likely to absorb a culture of violence rather than a culture of peace. The optional protocol must therefore be clear and unequivocal in its opposition to participation, compulsory or voluntary, direct or indirect.

7. UNICEF is aware that today most armed conflicts are not international wars but rather internal civil conflicts, and that not only governmental armies but also non-State armed forces are involved. UNICEF's position is that the use of children as soldiers by any group should be prohibited by the optional protocol. The recurrence of the use of child soldiers by such non-governmental armed forces is so high that the discussion on this explicit issue will be of paramount importance for UNICEF. However, concerns expressed by some countries on the implied recognition of non-governmental armed forces, and on the responsibility of States parties regarding the respect of the optional protocol by these groups, should be taken into consideration.

United Nations Population Fund

[Original: English]
[17 October 1995]

1. The Programme of Action of the International Conference on Population and Development (ICPD) takes special note of the situation and needs of the children and youth.

2. The Programme of Action, in chapter VI, has as one of its objectives, "to promote to the fullest extent, health, well-being and potential of all children ... in line with the commitments made in this respect at the World Summit for Children and in accordance with the Convention on the Rights of the Child". It also emphasizes the need of all children to continue their education as a means of equipping them for a better life and underscores the necessity of preventing early marriages and high-risk child-bearing, two factors associated with infant/child mortality and morbidity.

3. The Programme of Action calls on all countries "to adopt collective measures to alleviate the suffering of children in armed conflicts and other disasters, and provide assistance for the rehabilitation of children who become victims of those conflicts and disasters".

International Labour Organization

[Original: English]
[30 October 1995]

1. Generally speaking, the involvement of children, understood here as persons who have not attained 18 years of age, in armed conflicts does not fall within the mandate of the International Labour Organization.

2. ILO has nevertheless referred to questions relating to the personnel of armed forces (for example, art. 9 of Convention No. 87 on the Freedom of Association and the Right to Organise, 1948 regarding the application of the guarantees under the Convention to the armed forces; and the International Standard Classification of Occupations (ISCO-88) including armed forces as one of the groups).

3. The idea of "the minimum age for admission to employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons," who must not be less than 18 years (art. 3 (1) of Convention No. 138 on Minimum Age, 1973) may be applied in corollary to the involvement in armed conflicts, although the latter is considered to be outside the scope of the ILO Conventions on minimum age.

4. As to the scope of the "armed forces" to be covered by the draft optional protocol (its art. 2), the notion of "auxiliary and assimilated services" may be added, so as to cover also civil employment within public establishments dealing with defence, the police, frontier guard, and other armed services.

III. COMMENTS SUBMITTED BY THE EXPERT APPOINTED TO UNDERTAKE THE STUDY ON THE IMPACT OF ARMED CONFLICTS ON CHILDREN

[Original: English]
[6 November 1995]

1. In dozens of armed conflicts around the world, children have been used and abused not only as victims but increasingly also as active participants. Children have even themselves been led to commit serious abuses against other civilians. I therefore feel it is essential that the relevant international law norms be strengthened, in particular by raising the minimum age for recruitment into the armed forces - both voluntary and compulsory - and participation in organized violence - both direct and indirect - to 18 years. The draft optional protocol to the Convention on the Rights of the Child is an appropriate instrument to contain such a prohibition.

2. The draft optional protocol contained in the report of the Working Group (E/CN.4/1995/96) is an excellent basis for further discussion and has much to commend it. It is clear, however, that further strengthening is desirable. In this regard, we have read the joint NGO response to the draft submitted by the Friends World Committee for Consultation (Quakers) on behalf of the members of the NGO Group for the Convention on the Rights of the Child and the International Council of Voluntary Agencies and we fully endorse their position. We would add just two points to their written submission. First, in relation to draft article 2, the study would prefer the following formulation:

> "States Parties shall refrain from recruiting into their armed forces, even on a voluntary basis, any person under the age of 18 years."

Second, in relation to the proposed draft article on physical and psychological rehabilitation and social reintegration, we feel that further

discussion is required to agree upon a text that is capable of implementation yet does not in any way weaken existing provisions in the Convention, particularly article 39.

3. Finally, we hope that once a text is agreed, States involved in the preparation of the optional protocol will move swiftly towards its adoption, adherence and, most important of all, its respect.

IV. COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS

Friends World Committee for Consultation (Quakers)

[Original: English]
[6 October 1995]

1. This is a joint NGO response submitted by the Friends World Committee for Consultation (Quakers) on behalf of the members of the NGO Group for the Convention on the Rights of the Child and the International Council of Voluntary Agencies.

2. We welcome the progress which has been made so far and the generally positive approach of the Working Group to seek to raise the minimum age of recruitment into armed forces and participation in hostilities to 18 years.

3. Draft preamble: We support the idea that the preamble should be short and uncontentious, setting the scene for the substantive part of the draft optional protocol.

4. Draft article 1: We support the adoption of draft article 1 in the form: "States parties shall take all feasible measures to ensure that persons who have not attained the age of 18 years do not take part in hostilities." Since the primary objective of the protocol is to protect children from involvement in armed conflicts, the importance of a strong article 1 governing participation in hostilities cannot be overstated.

5. Draft article 2: We welcome the total prohibition of compulsory recruitment of under 18-year-olds into governmental armed forces as stated in the first sentence of draft article 2 (1): "States parties shall ensure that persons who have not attained the age of 18 years are not subject to compulsory recruitment into their armed forces." However, we oppose the voluntary recruitment of those under 18 years, even with the requirements of free consent of the child and of the parents or legal guardians. In the first instance, in many circumstances the degree of voluntariness is seriously open to question, and the requirement of parental or other consent inapplicable. Furthermore, if Governments are willing to accept a prohibition on the use in hostilities of under 18-year-olds, such volunteers should be treated as trainees, otherwise the governmental commitment to and ability to prevent their involvement in hostilities is open to doubt.

6. We are not in favour of military schools, believing that civilian schooling is in the best interests of the child. However, since the primary purpose of this protocol is to prevent recruitment into the armed forces themselves and involvement in hostilities of those below the age of 18 years,

we would be willing to see a tightly drafted exception for military schools and academies in the interest of accommodating States who would not otherwise be able or willing to become parties to the protocol.

7. New draft article: While it is important to prevent the recruitment and use of under 18-year-olds by governmental armed forces, most child soldiers today are serving in non-governmental armed forces or groups. We warmly welcome, therefore, the consideration given to this issue by the working group and its efforts to seek ways to reduce the incidence of such involvement. We recognize the difficulties of seeking to bind non-governmental entities by means of an international human rights law instrument, and the need not to provide recognition to such forces. At the same time, the protocol will be failing in its aim of protecting children from involvement in armed conflicts unless it addresses this issue. We would support a brief statement of the principle of non-recruitment and participation in hostilities of under-18s, with a corresponding legal obligation on States parties to ensure the application of this provision.

8. Draft article 3: We support this draft article as worded.

9. New draft article: While recognizing the importance of providing for the physical and psychological rehabilitation and social reintegration of children who have been involved in armed conflicts, we believe that the provisions of the Convention on the Rights of the Child already cover this adequately. Furthermore, there is a danger that adding an article on this subject in an optional protocol could weaken or overshadow what is already contained in the Convention.

10. New draft article: We recognize that so long as armed conflicts exist, children will become involved in them despite the best efforts of Governments and the international community. This sentiment could most appropriately be included in the preamble to the draft optional protocol.

11. Draft article 4: Since this is an optional protocol on a single specific subject, we would support the inclusion of a "no reservations" provision. However, if any reservations are to be allowed to the protocol, the limits of such reservations should be tightly drawn, preferably in the form of specifying articles to which no reservation is permitted. However, the question of reservations should be left until the substantive content of the protocol has been agreed and taking into account the possibility of denunciation as stated in draft article 9.

12. Draft article 5: We support this draft article as worded.

13. New draft article: We support the proposal that the Committee on the Rights of the Child should be able to initiate an enquiry if it receives reliable information about recruitment of children or their use in hostilities contrary to the provisions of the protocol but think that the wording could be improved at certain points. This provision would not duplicate the regular reporting procedure but would enable the Committee to seek clarification and further information where there seemed to be a practice of recruitment or use in hostilities. In particular, this could be of value where the alleged practice was by non-governmental entities, who are not subject to the

reporting requirement or examination by the Committee, where the Committee's role could assist in bringing pressure to bear on such armed groups to desist from such practices.

14. Draft articles 6 and 7: We support these draft articles as worded.

15. Draft article 8: We see no reason for the number of States parties to bring this protocol into force to be greater than that for other optional protocols to human rights treaties, that is 10.

16. Draft articles 9 and 10: We support these draft articles as worded.